IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-797

MICHAEL PUGLIA,

Plaintiff - Petitioner,

v.

THE HON. JOHN P. COTTER,
THE HON. SIDNEY A. JOHNSON,
AND JOHN P. EVANS

Defendants - Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

	Page
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	2
ARGUMENT	
I. Federalism Requires That Pending State Criminal Inquiries Not Be Restrained By Federal Courts.	3
II. The Complaint Fails To State A Cause of Action In That It Is A Hypothetical Situation And Fails To Raise Any Substantial Question.	8
CONCLUSION	11
CERTIFICATE OF SERVICE	12

CITATIONS

CASES:	Page
Alabama Power Co. v. *Ickes*, 302 U.S. 464 (1937)	8
Atlantic Coastline Railroad Company v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970)	6
Blair v. *United States*, 250 U.S. 273 (1919)	4
Cameron v. *Johnson*, 390 U.S. 611 (1968)	4
Cobbledick v. *United States*, 309 U.S. 323 (1940)	8
Copland v. *O'Connor*, 306 F. Supp. 375 (N.D. Calif. 1969)	4
Dombrowski v. *Pfeister*, 380 U.S. 479 (1965)	4
Douglas v. *City of Jeannette*, 319 U.S. 157 (1943)	4
Dyson v. *Stein*, 401 U.S. 200 (1971)	7
Gardner v. *Broderick*, 392 U.S. 273 (1968)	9
Hemans v. *United States*, 163 F.2d 228 (1947), cert. den. 332 U.S. 801	6
Hill v. *Martin*, 296 U.S. 393 (1935)	6
Jenkins v. *McKeithen*, 395 U.S. 411 (1969)	4, 6
Johnson v. *Lee*, 281 F. Supp. 650 (D. Conn. 1968)	3, 4
Karen v. *East Haddam*, 146 Conn. 720, 155 A.2d 921 (1959)	8
In re Kittle, 180 Fed. 946 (C.C.S.D. N.Y. 1910)	9
McLucas v. *Palmer*, 309 F. Supp. 1353 (D. Conn. 1970), aff'd., 427 F.2d 239 (2d Cir. 1970) per curiam, cert. den. 399 U.S. 937	3, 4

Murphy v. *Waterfront Commission*, 378 U.S. 52 (1964) 9

National Land & Investment Co. v. *Specter*, 304 F. Supp. 1004 (E.D. Penn. 1969), affirmed 428 F.2d 91 (3d Cir. 1970) 4

Nichols v. *Vance*, 293 F. Supp. 680 (S.D. Tex. 1968) 4

Perez v. *Ledesma*, 401 U.S. 82 (1971) 7

Polk v. *Ellington*, 309 F. Supp. 1349 (W.D. Tenn. 1970) 4

Salvaggio v. *Cotter, et al*, 324 F. Supp. 681 (D. Conn. 1971) 3, 4, 10

Samuels v. *Mackell*, 401 U.S. 66 (1971) 4, 7

Sheridan v. *Garrison*, 415 F.2d 699 (5th Cir. 1969) 4

Society of Good Neighbors v. *Groat*, 77 F. Supp. 695 (E.D. Mich. 1948) (three-judge court) 6

State v. *Kemp*, 126 Conn. 60, 9 A.2d 63 (1939) 9

Stefanelli v. *Minard*, 342 U.S. 117 (1951) 3, 5

Tileston v. *Ullman*, 318 U.S. 44 (1943) 8

Toucey v. *New York Life Ins. Co.*, 314 U.S. 118 (1941) 6

United States v. *Cahn*, 282 F. Supp. 274 (E.D. N.Y. 1968) 4, 6

Warner v. *Andrews*, 5 Conn. Sup. 63 (1937) 7

Younger v. *Harris*, 401 U.S. 37 (1971) 4, 7, 11

STATUTES AND COURT RULES:

28 U.S.C. § 2283 5

Act of March 2, 1793, C. 22 1 Stat. 333, 334 5

Rule 12(b) F.R.C.P. 2

Sec. 54-45, Conn. Gen. Stat. 8

Sec. 54-47, Conn. Gen. Stat. 2

Sec. 54-47a, Conn. Gen. Stat. 2, 3

Sec. 54-47(c), Conn. Gen. Stat. 10

Public Act No. 860 (Jan. Reg. Sess. 1971) 10

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STATEMENT OF ISSUES

Do the following questions warrant a granting of a petition of certiorari when both the District Court and the Court of Appeals found such questions to lack any merit:

1. Where a State inquiry into crime has been convened by a Supreme Court Justice pursuant to statute may a witness have such inquiry enjoined by resort to the Civil Rights Act?

2. Where state statutes provide that upon claiming the privilege against self-incrimination at such inquiry by a witness, such witness be granted full transactional immunity before he can be ordered to testify at the inquiry, and where the witness has not yet claimed such privilege, can he have the inquiry enjoined by resort to the Civil Rights Act?

3. Can such witness deliberately bypass his remedy of defending against any proceeding which would arise out of his refusal to testify before such inquiry, as well as his remedy of immunity above, by claiming among other things that the inquiry is an unreasonable search and seizure of his mind and would subject him to involuntary servitude?

STATEMENT OF THE CASE

This is a petition for certiorari to the United States Court of Appeals for the Second Circuit affirming a decision of the United States District Court for the District of Connecticut (Robert C. Zampano, Judge) dismissing plaintiff's action for an injunction and declaratory judgment requesting the impanelling of a three-judge District Court to determine the constitutionality of Sections 54-47 and 54-47a, Connecticut General Statutes, Revised to 1969.

On May 4, 1971 the District Court dismissed the action on motion of the defendants for failure to state a cause of action and for lack of jurisdiction pursuant to Rule 12 (b), F.R.C.P.

The United States Court of Appeals for the Second Circuit affirmed on September 27, 1971.

STATEMENT OF FACTS

There is no dispute as to the relevant facts. On April 14, 1971, the plaintiff was served with a subpoena to appear on April 19, 1971 before a judicial investigation being conducted by the Hon. Sidney A. Johnson, State Referee, to testify regarding his knowledge, involvement, or interest relative to gambling and felonious crimes of violence.

A two-day postponement was obtained by the plaintiff and on April 20, 1971 an ex-parte Temporary Restraining

Order was issued by the District Court together with a show cause order to be held on April 26, 1971. At the show cause hearing the defendants moved to dismiss.

It is significant that the plaintiff sought the ex-parte order before appearing at the inquiry and without even first claiming his privilege of self-incrimination at such inquiry. As noted by the District Court in its ruling, plaintiff "anticipated" that he would be granted immunity under Sec. 54-47a of the General Statutes. Such immunity would embrace "any transaction, matter or thing concerning which he is compelled to testify or produce evidence. . . ." Sec. 54-47a.

ARGUMENT

I.

Federalism Requires That Pending State Criminal Inquiries Not Be Restrained By Federal Courts.

It is well recognized that a three-judge court must be denied and the action dismissed where the Complaint fails to raise substantial federal questions. *Johnson* v. *Lee*, 281 F. Supp. 650, 654 (D. Conn. 1968). The Complaint is insubstantial where it obviously lacks merit or is clearly unsound because of previous court decisions. See *Salvaggio* v. *Cotter*, et al, 324 F. Supp. 681 (D. Conn. 1971).

Fundamental principles of federalism require that a federal court not interfere in the administration of criminal justice in the State courts except in the most extraordinary circumstances. *Stefanelli* v. *Minard*, 342 U.S. 117, 120 (1951); *McLucas* v. *Palmer*, 309 F. Supp. 1353 (D. Conn. 1970), aff'd., 427 F. 2d 239 (2d Cir. 1970) per curiam, cert. den. 399 U.S. 937.

The narrow area where federal jurisdiction is recognized is limited to bad faith prosecutions and improper abridgement

of First Amendment rights. *Cameron* v. *Johnson*, 390 U.S. 611 (1968); *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); and *Salvaggio* v. *Cotter*, et al, supra. See also *Dombrowski* v. *Pfeister*, 380 U.S. 479 (1965); *Sheridan* v. *Garrison*, 415 F. 2d 699 (5th Cir. 1969); *Polk* v. *Ellington*, 309 F. Supp. 1349, 1350, 1351 (W.D. Tenn. 1970).

Because of the absence of bad faith and abridgement of free speech, federal courts have refused to enjoin state grand jury proceedings specifically. *National Land & Investment Co.* v. *Specter*, 304 F. Supp. 1004, 1010-1011 (E.D. Penn. 1969), affirmed, 428 F. 2d 91 (3d Cir. 1970). See *United States* v. *Cahn*, 282 F. Supp. 275, 278 (E.D.N.Y. 1968). The *Specter* case explicitly held that similar allegations of "denial of counsel", lack of cross-examination and broad scope of investigation did not justify a federal injunction. 304 F. Supp. at 1012-1013. See also *Jenkins* v. *McKeithen*, 395 U.S. 411, 430 (1969); *Blair* v. *United States*, 250 U.S. 273, 282 (1919).

Furthermore, criminal proceedings can be enjoined only where there is a clear danger of irreparable injury both great and immediate. No person is immune from prosecution in good faith for alleged criminal acts even though he claims constitutional infirmities. *Younger* v. *Harris*, supra; *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163-164 (1943). Special circumstances beyond this are required. *Cameron* v. *Johnson*, supra, 390 U.S. 618; *United States* v. *Cahn*, supra, 282 F. Supp. 278; *Nichols* v. *Vance*, 293 F. Supp. 680, 683 (S.D. Tex. 1968).

There are adequate remedies in this case including show cause hearings, writs of prohibition and normal state criminal process and appellate procedure, eventual application to the United States Supreme Court if necessary and proper, as well as state and federal habeas corpus proceedings. See *Johnson* v. *Lee*, supra, 281 F. Supp. 656; *McLucas* v. *Palmer*, supra, 309 F. Supp. 1358; *Copland* v. *O'Connor*, 306 F. Supp. 375, 377 (N.D. Calif. 1969).

Thus as noted in *Stefanelli*, supra, at 123:

> "If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law — with its far-flung and undefined range — would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impanelling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

Title 28 U.S.C., § 2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Almost from the beginning of our judicial history Congress has restricted the grant of injunctions by federal courts to stay state court proceedings. Act of March 2, 1793, C.22, 1 Stat. 333, 334.

> "The Act of 1793 expresses the desire of Congress to avoid friction between the federal government and the state resulting from the intrusion of federal authority

into the orderly functioning of a state's judicial process."

Toucey v. *New York Life Ins. Co.*, 314 U.S. 118, 132 (1941) Frankfurter, J.

Consonant with this purpose, the term "proceedings" is a broad one.

> "That term [proceedings] is comprehensive. *It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final* process. . . . It applies alike to action by the court and by its ministerial officers. . . . Thus the prohibition applies whatever the nature of the proceedings, unless the case presents facts which bring it within one of the recognized exceptions to section [2283]."
>
> *Hill* v. *Martin*, 296 U.S. 393, 403 (1935) (Emphasis added.).

See also *Atlantic Coastline Railroad Company* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970).

It is settled that grand jury proceedings in general are state court proceedings within the meaning of this statute. *United States* v. *Cahn*, supra, 282 F. Supp. 277. This also applies to one-man grand juries. *Society of Good Neighbors* v. *Groat*, 77 F. Supp. 695 (E.D. Mich. 1948) (three-judge court). That case involves proceedings under closely similar Michigan statutes. In holding a one-man grand jury to be a state court proceeding under statutes comparable to the Anti-injunction Act, the U.S. Court of Appeals for the Sixth Circuit recognized that this investigation constituted a judicial inquiry. *Hemans* v. *United States*, 163 F. 2nd 228, 235, cert. den. 332 U.S. 801. The one-man grand jury in Connecticut certainly meets the definition for the type of proceedings distinguished in *Jenkins*, supra, which merely investigates and re-

ports. It differs only in that it is in this case acting as a direct arm of the court. But this makes the Anti-injunction statute even more pertinent.

The involvement of the State court proceedings is also present in this case because of the service of a subpoena under the authority of the Chief Prosecuting Attorney. See *Warner* v. *Andrews*, 5 Conn. Sup. 63, 65 (1937).

In this respect it is noteworthy that the petition for certiorari refers to the state inquiry in this case as the "Connecticut State Court Proceedings." p. 4.

On the same day [Feb. 23, 1971] as the *Younger* decision, the Supreme Court announced several other decisions of relevance to this action. In *Perez* v. *Ledesma*, 401 U.S. 82 (1971), the Supreme Court set aside an injunction ordered by a three-judge court against a Louisiana criminal statute reaffirming *Younger* in view of the disruptive effect of the injunction on other pending state criminal prosecutions. See also *Dyson* v. *Stein*, 401 U.S. 200 (1971). In *Samuels* v. *Mackell*, supra, the Court held that declaratory relief is also improper when a prosecution involving the challenged statute is pending in state court at the time the federal suit is initiated.

Consonant with the policies against interference with pending state court proceedings is the principle that grand jury proceedings should not be subjected to undue interference.

> "It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the

'orderly progress' of investigation should no more be encouraged in one case than in the other."

Cobbledick v. *United States,* 309 U.S. 323 at 327 (1940) (Frankfurter, J.).

II.

The Complaint Fails To State A Cause Of Action In That It Is A Hypothetical Situation And Fails To Raise Any Substantial Question.

A person has standing to raise constitutional issues only when his own constitutionally protected rights are affected. *Tileston* v. *Ullman,* 318 U.S. 44 (1943). Furthermore, the right asserted must be a legal right and not just a personal one. *Alabama Power Co.* v. *Ickes,* 302 U.S. 474 (1937); *Karen* v. *East Haddam,* 146 Conn. 720, 155 A. 2d 921 (1959). There must be a substantial and not merely a remote or individual interest involved. It is the present case that we must be concerned with and not some possible or hypothetical one. *Id.*

In this case the plaintiff is neither accused nor threatened with prosecution. He has been summoned only as a witness to appear before a judicial inquiry. The documents submitted by the plaintiff himself show that he is not unfamiliar with his rights.

It is, therefore, clear that under the facts as alleged plaintiff has no standing whatsoever to challenge the activities of Justice Cotter, Judge Johnson and Chief Prosecutor Evans as set out in the Complaint.

From time immemorial grand juries have been subject to overall supervision of the court. They are ordered to be summoned by the Court. Sec. 54-45, Conn. Gen. Stat. (Rev. to 1968). When necessary, the members have been selected by

the court. They need not have laid before it an indictment charging any particular individual with crime, but may investigate whether any crimes have been committed in connection with various matters. See *State* v. *Kemp*, 126 Conn. 60, 64, 66-67, 9 A. 2d 63 (1939). Thus the duties of Justice Cotter in respect to the present inquiry are fully within the judicial power.

As to the duty of inquiry now vested in Judge Johnson, the power of the Court to examine witnesses to ascertain the truth needs no citation of authority.

Plaintiff's claims as to the Fifth Amendment contravene the established decisions of this Court.

> "Answers may be compelled regardless of the privilege [against self-incrimination] if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying.
>
> *Gardner* v. *Broderick*, 392 U.S. 273, 276 (1968).
> *Murphy* v. *Waterfront Commission*, 378 U.S. 52 at 79 (1964).

See also *In re Kittle*, 180 Fed. 946, (C.C.S.D.N.Y. 1910) ("When so questioned, the witness [who has been granted immunity] must answer." Hand, J.).

Plaintiff's contention of an unreasonable search and seizure of his mind and involuntary servitude are totally devoid of any merit and warrant little discussion. In this case, the record indicates that the subpoena required solely the appearance of the witness. No documents or other effects were summoned. *Gardner* and *Murphy*, supra, make it clear that once adequate immunity is provided, answers may be compelled. Furthermore, if plaintiff's arguments were to be

accepted, then for what purpose was the Fifth Amendment adopted?

In addition, we note that Sec. 54-47 (c) of the General Statutes was amended in 1971 to add the following provision:

"At any such hearing a witness shall have a right to counsel and shall be informed of such right by the of-

Public Act No. 860 (Jan. Reg. Sess. 1971), effective October 1, 1971.

Finally, the remaining claims of the plaintiff have been fully dealt with and dismissed in *Salvaggio* v. *Cotter*, supra.

CONCLUSION

"A federal lawsuit to stop a prosecution in a state court is a serious matter." *Younger* v. *Harris*, supra, 401 U.S. at 42. Although the present proceedings are not an actual prosecution, they can be essential to a prosecution. To award the extraordinary equitable action demanded in this case would first of all delay and disrupt state court proceedings. It could easily bring the federal court into constitutional questions which may later prove to be academic and unnecessary. It can lead to unjustified harassment of state officers including judges who are clearly acting in good faith. Most important, effective state law enforcement would be paralyzed.

It is clear that the rulings below are consonant with the decisions of other Courts of Appeal and also are in full accord with the decisions of the United States Supreme Court.

It is therefore respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Daniel R. Schaefer, Attorney for the Respondents, the Honorable John P. Cotter, Chief Court Administrator, and the Honorable Sidney A. Johnson, State Referee, certify that on the 10th day of March, 1972, I served a copy of the foregoing Brief by mailing, United States Mail, Postage Prepaid, to the following attorneys of record:

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